No. 94-1299

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

THE SCHOOL DISTRICT OF THE CITY OF LADUE, a public corporation, and BARBARA SACKS, CHARLES H. COBAUGH, JOYCE FOLLMAN, ROBERT MINKLER, ANN BOON, CHARLES MCKENNA, ROBERT ADLER, NANCY ALBERT, LINDA SHER and JOLYNN WEINER,

Petitioners,

—v.—

THE GOOD NEWS/GOOD SPORTS CLUB, an unincorporated assocation, JORDON HEIMBURGER, a minor, by his Next Friend, L. Corbett Heimburger, CHRISTOPHER HIRT, a minor, by his Next Friend, Peggy Hirt, DAVID HIRT, a minor, by his Next Friend, Peggy Hirt, COMFORT IBE, a minor, by her Next Friend, Afocha Ngozi Ibe, PEGGY HIRT, JOHN HIRT, SUSAN MALLORY, GEORGE MALLORY, LARRY TYCHSEN, DAWN HUFFMAN, GABOR CSENGODY, PAT CSENGODY, AFOCHA NGOZI IBE, KATHRYN HEIMBURGER, and L. CORBETT HEIMBURGER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONERS' REPLY BRIEF TO BRIEF IN OPPOSITION

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I. THIS CASE IS NOT MOOT

Well-settled law establishes that mere voluntary cessation of illegal conduct, such as the School District's recent decision to eliminate access for the Scouts between 3:00 and 6:00 p.m., does not moot this case. *U.S. v. Munsingwear, Inc.*, 340 U.S. 36 (1950).

Ladue School District has not permanently abandoned its challenged policy. Rather, as the language of its Resolution makes clear, the District has adopted an interim measure, responding to an interim development in this litigation, while proclaiming an intention to revisit the issue after this Court acts on this Petition.

The interim nature of the Resolution is repeatedly emphasized.[1] Thus, the Resolution announces that the District will petition this Court for review; that the District must in the meanwhile accommodate the ruling of the Eighth Circuit, "pending final disposition of that case" and

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1. The relevant Resolution is reproduced at Appendix I to Respondents' Brief in Opposition.

that the Resolution addresses the deficiency found by the Court of Appeals "pending final disposition of the case." Moreover, that Resolution announces that the District "will review and reconsider the ... Policy ... immediately following the disposition of the lawsuit ...."

Respondents' claim that this action was "voluntary", Brief In Opposition at 9, and *id.* at n.13, and hence is a waiver of the right to seek review here is groundless. The Eighth Circuit had invalidated the District's prior access policy, and refused to stay its judgment pending appeal. The District could continue to enforce that policy only by defying the Court, not an alternative for a school board charged with educating students toward good citizenship.

The District then, had two remaining alternatives, neither of which it would have entertained had it not been for the Eighth Circuit's decision – close the forum entirely (the choice it reluctantly adopted) or open it to any group professing views on the upbringing of children (that would

have been Respondents' choice), but which the District thought would have departed from its duty to children in its care.

The Ladue School Board has not now seen the constitutional light. It has not been through an election, with new members elected on a platform repudiating its prior litigation position. Cf. *Karcher v. May*, 484 U.S. 72 (1987). On the contrary, it has only grudgingly yielded to the command of a divided appeals court.

There is no doubt that there is now a live controversy remaining between the parties. The District insists that it can grant access to the Scouts but not to Respondents. The Respondents deny the District may do so.

There is likewise no doubt that a decision of this Court will affect the rights of the parties in tangible ways. If the Petitioners' position is upheld, they will revert to the

former policy abandoned only under compulsion.[2] If the Respondents' position is upheld, the District will have to decide whether it wishes to permanently exclude popular scout and athletic programs from its facilities between 3:00 and 6:00 p.m., a very different question for an elected school board than the question of whether it will exclude those groups for a few months while a Petition for Certiorari is pending.

Maher v. Roe, 432 U.S. 464, 468, n.4 (1976) is dispositive. There, this Court refused to dismiss as moot an appeal of a decision invalidating a state welfare regulation, when, in response the decision appealed from, an interim regulation was adopted. This Court reasoned that the new regulation was only a stop-gap for purposes of interim compliance and hence that the underlying

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2. This case is therefore wholly unlike *Princeton University v. Schmid*, 455 U.S. 100 (1982) which challenged regulations amended while the case was pending on an as-of-right appeal, where the prior regulations had been upheld in the lower courts,

appeal was not moot. Accord, *Norfolk & W. Ry Co. v. American Train Dispatchers Ass'n*, 499 U.S. 117, 128 n.3 (1991); *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 791, n.1 (1985). See 13A C.A. Wright, A.R. Miller and E.H. Cooper, Federal Practice & Procedure, § 3533.2 at nn. 45-55.

The Respondents' suggestion of mootness amounts to a claim that in any case in which Petitioner is denied a stay of mandate, and complies with the challenged decision, it has mooted the lawsuit. This is to make the stay-of-mandate decision determinative of the right to seek review in this Court. But it is this Court, not the lower courts, which passes on Petitions for Certiorari.[3]

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3. If the Respondents believed that the District's action was not in keeping with the decision of the Eighth Circuit, they could have either sought enforcement of the mandate in the District Court or moved to have the District held in contempt.

II. THE BRIEF IN OPPOSITION ONLY SERVES TO UNDERLINE THE NEED FOR REVIEW IN THIS COURT

A. Does Viewpoint Discrimination Require A Showing of Animus?

Respondents acknowledge that the Eighth Circuit did not find that the District acted out of animus directed against their religious speech. Indeed, the District Court specifically found that the District had no such motive, and that finding was not held to be clearly erroneous. [Brief in Opposition at 15-16.] They insist that they need no such proof, that it is enough if the decision was traceable to concerns about the Club's activities. [Brief in Opposition at 18-21.]

Petitioner agrees that the decision to change the policy regarding access can ultimately be traced to complaints about the Club. [Cert. Petition at 14.] The legal dispute between the parties (and between the majority and dissent in the Court below) is whether that fact as a matter of law inevitably and necessarily

establishes a case of viewpoint discrimination without regard to a motive to squelch a particular viewpoint. Petitioners submit that *Perry Educ. Ass'n v. Perry Local Educ. Ass'n*, 460 U.S. 37 (1983) and *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788 (1985)* hold that it does not. Respondents disagree.

Most telling of all against Respondent's position is *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), a case relied on in the Petition. There, complaints against a specific band about the volume of its (political) concerts in New York City's Central Park, led the Parks Department to promulgate new rules governing the production of park concerts. Those rules, like the rules here, were without doubt traceable to complaints about the band's political speech. That did not lead to invalidation of the rules.

Citing cases from very different areas of free speech law, see, *e.g. City of Cincinnati v. Discovery Network*, 113 S.Ct. 1505 (1993) [Brief in Opposition at 22-23], Respondent denies that *mens rea* is a *sine qua non* of a free speech claim. But that submission collapses the distinction drawn in *Cornelius* between permissible subject matter distinction and impermissible viewpoint discrimination into incoherence. Respondents' monochromatic, one-standard-fits-all approach to the First Amendment is stultifying.

But we stray from the limited purposes of this brief. Perhaps on full briefing and oral argument Respondent will persuade this Court that it should discard *mens rea* in all First Amendment (free speech? free exercise? free press?) cases. But since as noted several cases would have to be overruled to reach that result, a demonstration of

why this case should be reviewed by this Court case flows naturally from Respondents' Brief in Opposition.

B. Is Lamb's Chapel Dispositive?

For Respondents, *Lamb's Chapel v. Center Moriches U.F.S.D.*, 113 S.Ct. 2141 (1993) is wholly dispositive of this case. There is no gainsaying the importance of *Lamb's Chapel* to the ultimate resolution of this case. But *Lamb's Chapel* presents the obverse of this case. There, all groups but the religious ones were admitted to the (arguably) non-public forum.[4] Here, all but scout (and athletic) groups were excluded.[5]

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4. Indeed, access was so broad that this Court expressed doubt that it was non-public forum altogether. 113 S.Ct. at 2146.

5. Respondents are inconsistent in their attitude toward the athletic groups. In the courts below they did not ague that they were comparable to athletic clubs for purposes of assessing reasonableness of their exclusion from a non-public forum. Yet when they want to impress this Court with the number of meetings held in the 3:00-6:00 p.m. period,-they count athletic events. [Brief in Opposition at 13.] Respondents cannot have it both ways.

That the Club was religious proved only that it was not a scout or athletic program. So would the fact that it was a stamp club, scuba diving club, a history of the Supreme Court club, or a ballroom dancing club. Religious speech was not the target of the District's rule.

Perhaps this ultimately is not a sufficient distinction between this case and *Lamb's Chapel*. If it is not, then *Perry Educ. Ass'n v. Perry Local Educ. Ass'n, supra*, in which some groups were granted access and some were not, and in which no viewpoint discrimination was found, is likewise wrongly decided.[6]

Again, the point is not whether Petitioners' or Respondents' view of the law is sounder, but whether the issues are sufficiently in doubt and sufficiently important to merit review here. We submit that, far from

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6. Respondents' case is, on their own terms, not strengthened because their speech is religious, and the speech at issue in *Perry* involved economic conditions in the workplace. To draw such a distinction would be to practice viewpoint discrimination.

diminishing the importance of the issue, Respondents' invocation of *Lamb's Chapel* in ways that bring it into conflict with *Perry* (and *Cornelius*) – an approach adopted by the Eighth Circuit – underscores the need for review by this Court.

III. THE ESTABLISHMENT CLAUSE QUESTION IS OPEN

Respondents' Establishment Clause arguments add little to the points made in the Petition. We note only that Respondent assigns talismanic effect to the fact that their religious speech is nominally private and hence, they claim, wholly outside the purview of the Establishment Clause. There is no point in repeating the arguments for or agains Respondents' proposed rule of law. It is sufficient to note that this proposition was sufficiently uncertain in the public forum context, to merit this Court's review in *Capital Square Review Board v. Pinette*, 94-780. It is no less important and no less difficult – indeed, it is

more difficult – in this non-public forum context. At the very least, this case should be held for *Pinette*.

CONCLUSION

A writ of certiorari should be granted.

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